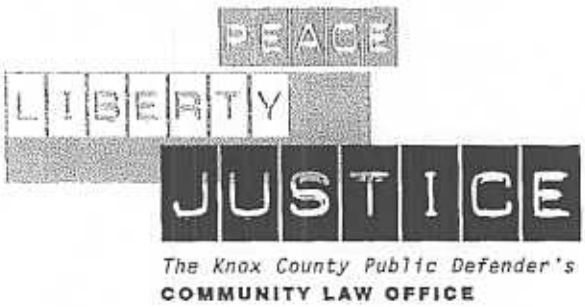

The Knox County Public Defender's
COMMUNITY LAW OFFICE

RECEIVED BY FAX
DATE: 1-22-04

January 22, 2004

Janice Rawls, Chief Deputy Clerk
100 Supreme Court Building
401 Seventh Ave., North
Nashville, TN 37219-1407

Re: Comments to Proposed Amendment to Supreme Court Rule 13

Dear Ms. Rawls:

I am an Assistant Public Defender at the Knox County Public Defender's Office. I am aware that you have received many letters from attorneys, experts, and other interested parties regarding the proposed changes to Rule 13. Because so many of these people have addressed concerns similar to my own, I would like to focus on only a few of the most vital issues of interest to me and the clients I represent.

I am most concerned about the elimination of ex parte hearings, a change which would place indigent defendants at a distinct disadvantage. I believe that in this area, as the rule currently reads, persons charged with crimes are already at a disadvantage in many cases where expert testimony is involved. As the keeper of the evidence, the District Attorney's office has liberal if not unlimited access to evidence in any particular case. District Attorneys can use this access to arrange any number of experts to examine the evidence, without the knowledge of the person charged or his or her counsel. A person charged with a crime, however, must make arrangements for his or her expert to view or examine the evidence and at times, the knowledge of these arrangements in themselves, give the State an advantage. To include the District Attorneys in the initial request for expert services would increase the State's advantage because although their trial strategy and use of experts would be secret, the strategy and work product of defense counsel would be revealed to the State. This procedure would also draw a distinction between indigent defendants, whose strategy and work product would be revealed to the State, and Defendants who are able to hire experts, about whom the State would not know.

I am also concerned about the rate caps for expert service. I believe an exodus of experts would result from the proposed rate cap. One expert I have used on occasion has announced he will no longer be available for indigent defendants due to problems he has had with the Administrative Office of the Courts in getting his fee for work completed. The limitation on fees and the proposal to abolish interim billing will not only take away any financial incentive for expert services for indigent defendants, but experts will likely view these cases as financial

MARK E. STEPHENS Public Defender 1101 Liberty Street Knoxville,TN 37919 PH 865-594-6120 Fax 865-594-6169 www.pdknox.org

liabilities. It will become difficult if not impossible to obtain competent experts in indigent cases, and without competent experts, persons charged with crimes will be unable to obtain a fair trial.

As an Assistant Public Defender, I will not be financially affected by the cap of fees for appointed attorneys; however I am concerned that that the inadequacy of the hourly fee for attorneys will drive competent attorneys away from the practice of taking appointed cases. I have seen good attorneys turn down appointments on complicated cases due to low caps and a fear that their efforts will not be compensated, and I am concerned that more and more attorneys will follow suit. I do not believe it is in anyone's best interest, including the State, to have a pool of lowest-common-denominator attorneys representing clients. I have seen judges, prosecutors and defendants equally frustrated by inadequate representation.

I want to thank you for your time and consideration in these matters. I am confidant that the financial and administrative concerns of the Tennessee Supreme Court and the Administrative Office of the Courts can be addressed by rules or procedures that will not so adversely effect the rights of the indigent accused.

Sincerely,

Jamie Niland
Assistant Public Defender

JN/rw

WILLIAM J. ELEDGE
ATTORNEY AT LAW

28 Public Square
Lawrenceburg, Tennessee 38464
(931) 762-2229
Fax (931) 762-2252
Licensed in Tennessee & Mississippi

JAN 2 2 2004

January 22, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
VIA Fax # 615-532-8757

RE: Proposed Supreme Court Rule 13 Comments

Dear Ms. Rawls,

As an attorney who handles a significant number of court-appointed indigent defense clients and Guardian Ad Litem cases, I would respectfully offer the following comments regarding the proposed changes to Supreme Court Rule 13:

The hourly rate of $40.00 or $50.00 per hour is less than a third of the typical hourly rate charged to most non-indigent "paying" clients, even those in largely rural areas such as here in the 22nd Judicial District. More importantly, the maximum fee caps for each case are far too low, even for Complex & Extended cases. As an example, my last "A" Felony jury trial was an Attempted 1st Degree Murder case which was certified by the Trial Court as a Complex & Extended case. My compensation for this case (which involved a three day Jury Trial with 18.9 In-Court hours and 77 Out of Court Hours, which does not include the Sentencing hearing and Motion for New trial currently scheduled for February 2004) is limited to a Maximum of $3,000.00 dollars. I dare say it would be impossible to find a qualified attorney anywhere in this state who would willingly agree to accept such an "A" Felony jury trial case for this amount from a non-indigent "paying" client. **If the hourly rate is to remain at $40.00 or $50.00 per hour, then the maximum fee caps should at least be raised to a level comparable to that of similar non-indigent "paying" client cases, perhaps on a "sliding scale" based on the category of the underlying Felony.**

The proposed Rule 13 rule changes will make it more difficult to get qualified experts to assist in the defense of court-appointed indigent client cases, as it adds an increased level of review once the Trial Court Judge has already approved the Ex Parte Order Granting Expert Witness Funds. Submission of the approved Trial Court Ex Parte Order to the Administrative Office of Courts and then to the Tennessee Supreme Court is an intrusion into the independence of Petitioner's Post-Conviction Relief claim by essentially requiring prior approval of Petitioner's Post-Conviction Relief Court strategy (by the approval or disapproval of expert witness funds) by the same Appellate Judiciary which will ultimately review the appeal of Petitioner's Post-Conviction Relief claim if he is unsuccessful at the Circuit/Trial Court level. Such a procedure thereby denies discretion to the Trial Court to Order state funded expert witness assistance based upon the facts and circumstances of the case when Defense counsel has shown to the satisfaction of the Trial Court Judge "an adequately particularized need that said expert would be of material assistance to the defense theory of the case, and that failure to provide said expert would prejudice Defendant", in violation of *State v. Williams*, 929 S.W.2d 385 (Tenn. Crim. App. 1996); *State v. Edwards*, 868 S.W.2d 682 (Tenn. Crim. App. 1993); and *State v. Evans*, 838 S.W.2d 185 (Tenn. 1992).

WILLIAM J. ELEDGE
ATTORNEY AT LAW

28 Public Square
Lawrenceburg, Tennessee 38464
(931) 762-2229
Fax (931) 762-2252
Licensed in Tennessee & Mississippi

The proposed Rule 13 rule changes will also continue the practice of denying Expert Witness Funds in Non-Capital Post-Conviction Relief claims, even in complex homicide cases in which **said expert witness funds would have been available in the Trial Court level to Trial Court counsel.** In cases such as these, if Petitioner had the constitutional due process right to the assistance of expert witness funds at the original Trial Court level during a Non-Capital case, Petitioner's constitutional rights to the assistance of expert witness funds do not and should not suddenly vanish at the Post-Conviction Relief level.

Please do not misunderstand the intention of these comments. My solo law practice consists primarily of court appointed indigent defense work because I truly enjoy such work, particularly actual trial work. **I simply believe that the Tennessee Court system would be far better served if significant changes were made to Rule 13 beyond those contained in the Proposed Changes which are currently under consideration.**

Sincerely,

William J. Eledge
Attorney at Law

National Association of Sentencing Advocates

JAN 2 3 2004

January 23, 2004

Mr. Mike Catalano
Clerk of the Tennessee Court of Appeals
and the Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue, North
Nashville, Tennessee 37219

Dear Mr. Catalano:

The enclosed document is the comment of the National Association of Sentencing Advocates on the Supreme Court's proposed changes to Rule 13. Please deliver it to the appropriate persons. Thank you very much.

Sincerely,

Lisa Rickert

Lisa Rickert
President
Governing Board

Harmon L. Wray

Harmon L. Wray
Executive Director

514 Tenth Street, NW, Suite 1000 ~ Washington, DC 20004
tel: 202.628.0871 ~ fax: 202.628.1091
www.sentencingproject.org/nasa ~ e-mail: nasa@sentencingproject.org

Comments of the National Association of Sentencing Advocates on the Proposed Amendments to Tennessee Supreme Court Rule 13

The National Association of Sentencing Advocates (NASA), begun in 1991, is a membership association of approximately 250 persons who work in sentencing advocacy as members of defense teams in criminal cases. Some are staff members of public defender offices, non-profit community agencies, or other government offices. Some are in private practice. Some NASA members work exclusively on death penalty cases as Mitigation Specialists. Others work exclusively on other types of criminal cases. Many do both. Some members work on defense teams for affluent clients, but most work primarily or exclusively with indigent defendants. NASA is a program of The Sentencing Project, based in Washington, DC. In 2003 there were thirteen NASA members in Tennessee.

NASA has serious concerns with much of the substance of the proposed changes in Rule 13, but at another level is concerned with the overall tone and tenor of the proposals. A general observation is that the changes appear to be motivated by one overriding goal: to save some money in the short run, and to do so by further exacerbating the already sizeable gulf between the substantial resources and the broad discretion available to the prosecution and the severely limited resources and discretion enjoyed by the defense. NASA believes that if enacted, many of the proposed changes will have the effect of being penny-wise and pound-foolish, especially in death penalty cases, since they will raise issues which will provoke more challenges from the defense, more reversals by federal courts, a protracted appeals process, and -- in the long range -- greater outlays of taxpayers' money.

NASA is also concerned that some of the proposed changes will have the effect of discriminating against indigent defendants, and in favor of those affluent clients who can afford to pay for private lawyers, experts, investigators, and sentencing advocates or mitigation specialists.

NASA believes that the adoption of the proposed changes would grant more power to individuals and entities whose experience does not include the actual litigation or serious criminal cases, especially death penalty cases, and who may be brought into a conflict of interest between their role as decision makers on defense funding requests in particular cases and their role as decision makers on those same cases.

Finally, NASA is concerned that the proposed changes, as a whole, evidence (or, at least, are likely to lead to) a profound isolationist tendency. The pressure towards the appointment of state public defender staff or in-state (or contiguous states) defense counsel, and of in-state (or contiguous state) experts, seem to exhibit a sense that we will just do things the Tennessee way, or at most, the Southern way, and pretend that we do not have to concern ourselves with the wider nation in structuring and implementing our state's indigent defense system and death penalty litigation system. The fact that the proposed rule changes demonstrate no awareness

of, or interest in, the revised 2003 version of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, is telling. Similarly, there is in the Rule 13 proposed amendments no apparent familiarity with the recent United State Supreme Court ruling in Wiggins v. Smith. The reason we cite these documents is that the proposed Rule 13 changes are at many points inconsistent with them, and that they are very likely to have great influence on death penalty jurisprudence throughout the United States, especially on the minimal standards for mitigation work at the sentencing phase.

Having summarized NASA's overall concerns with the proposed changes, let us now turn to some more targeted concerns relative to specific sections of the proposed new Rule 13. Here we will limit our comments to those sections with which we have particular experience and expertise due to the nature of our work in the criminal justice system, Sections 4 and 5.

Section 4 -- Payment of expenses incident to representation

(a)(3)(C) -- For this restriction to the $70 state rate for lodging to work for sentencing advocates and mitigation specialists who are in private practice or work for non-profit organizations, it would seem to be necessary for them to be issued some kind of ID to make it possible for them to be charged at the state rate. This would also seem to apply to private counsel, experts, and investigators who are not state employees.

(a)(3)(D) -- Why are not meals during the course of in-state trips to be reimbursed? This exclusion only sets up an incentive to make most trips overnight, which costs more money than it would to reimburse for meals in all cases of travel.

(a)(3)(L) -- This provision constitutes an instance of discrimination against individual defendants who need such services in order for members of the jury not to be prejudiced against them because of some deficiency or irregularity in their appearance. Such items should be reimbursable at the discretion of the trial court.

(b) -- Why it is necessary to obtain prior approval for out-of-state travel on a case, when it is not required to do so for in-state travel? Whether a destination is or is not within Tennessee is not necessarily determinative of the need for it (in order to provide a constitutional defense for the defendant) or of its cost. The burdensome procedure of gaining approval by both the trial court and the Administrative Office of the Courts needlessly complicates the work of investigation and trial preparation, and lengthens the time required for the case to proceed to final disposition, which costs more for the taxpayers.

Section 5 -- Experts, investigators, and other support services

(a) -- This should be revised to clarify that such services may be required at any stage after the appointment of counsel, including pre-trial, not just at trial, on direct appeal, and in post-conviction proceedings.

(a)(3) -- This provision has at least two serious problems. First, it requires indigent defendants who cannot afford to pay for investigative, expert, and sentencing advocacy services to disclose elements of defense strategy to the prosecution and to have to fight for them in a contested court proceeding, neither of which is necessary to more affluent defendants who can pay for them without going to the court. Second, it sets up a potential problem in cases which become death penalty cases only very late in the game, after the opportunity for an ex parte hearing to seek expert, investigative, and mitigation services has passed.

(a)(4) -- Defense counsel in post-conviction proceedings in non-capital cases should also have the possibility of seeking funds from the government for investigative, expert, and/or sentencing advocacy services, since such resources are available to the prosecution in such proceedings.

(b)(1)(C) and (D)-- This provision is especially troubling from NASA's standpoint because it betrays a lack of understanding of the work that our members do. The nature of sentencing advocacy and mitigation work in criminal cases necessitates that such specialists often do not know in the beginning of working on a case the "means, date, time, and location" of the work that must be done in a particular case. It becomes sheer guesswork to be forced to itemize such factors in advance in the effort to obtain necessary funding for the work to proceed. The essence of this work is an exploration of witnesses, documents, patterns, and themes in an evolving search to understand the defendant's life, family, and interaction with various social institutions (school, military service, social service agencies, medical facilities, community of faith, etc.). This sort of work differs greatly from the other services provided by other investigators and experts, such as crime scene investigation or conducting a battery of psychological tests on a defendant.

(b)(2) -- The requirement to first do a search for needed experts in-state, and then in tennessee's nine contiguous states, is very burdensome and time-consuming, and, thus, costly. It also betrays a "one-size-fits-all" view of experts that does not conform with reality. Finally, once again, it discriminates against those defendants too poor to be able to go out and hire the best (even if farthest away) expert that more affluent defendants can do as a matter of course.

(b)(3)(B) and (C)-- For NASA members and others in the field of defense-based sentencing advocacy, this is a most troubling part of the proposed Rule 13 changes., assuming that our field is included as "investigative or other similar services." Unlike most investigative work and other forensic expert work per se, much of this work goes more toward assisting counsel framing a theory and a strategy of defense than it does toward yielding "specific facts" that constitute "admissible evidence." Moreover, as in the comment on (b)(1)(C) and (D) above, this requirement to

itemize in advance with such specificity flies in the face of the very nature of this work, which is impossible to predict at the outset of the case.

(c) -- This whole "particularized need" portion of the proposal is fraught with problems from the perspective of sentencing advocacy. Again, it exhibits a total lack of understanding of the kind of work that mitigation specialists and sentencing advocates do. It requires such professionals and defense counsel to get the cart before the horse, in effect, to know what they are going to find before they set out on the exploratory journey. These provisions are a set-up for abuse by a hostile trial court.

(c)(4)(D) -- This point appears to be rooted in an assumption that a lawyer can be as good a mitigation specialist as a professional mitigation specialist is, since the former is able to interview witnesses. If this interpretation is correct, it amounts to a gratuitous insult to professionals who have spent many years developing the insight and skills to interview defendants' family members about vulnerable information (which often requires repeated visits to build trust and a sense of safety on the part of the witness).

(d)(1)(A) through (K) -- In this portion of the proposal, seemingly arbitrary maximum hourly rates for a number of types of professionals who might be on a defense team or called as experts are established. NASA's research on payments for mitigation specialists in a number of states indicates that the maximum rate proposed here -- $65/hour -- is lower than the rates which seem to prevail in a number of other states. This will have the effect -- indeed it is already having the effect of persuading some highly skilled mitigation specialists, some of whom live in Tennessee, to no longer take Tennessee cases. It also discriminates against those indigent defendants who are unable to pay the asking fee of the best professionals available.

(d)(2) -- The requirement that experts, investigators, mitigation specialists, and the like bill and be reimbursed for travel time at only one-half the already low hourly rates in (d)(1) will further exacerbate the problem.

(d)(4) and (5) -- The arbitrary caps on expert and investigative services for post-conviction in capital cases, which probably are intended to encompass mitigation specialists as well, are insufficient for many death penalty cases. This practice of setting such caps also is inconsistent with the 2003 ABA Guidelines (see Commentary on Guideline 9.1).

Section 6

(b)(2) -- The reference to "due consideration of state revenues," in the context of this document as a whole, is a clear message that if this Rule is adopted, whenever revenues are low, even pre-authorized claims in which the work has been completed are at risk of going unpaid or only partially paid.

VANDERBILT FORENSIC PSYCHIATRY
1601 TWENTY-THIRD AVENUE SOUTH
NASHVILLE, TENNESSEE 37212
TELEPHONE (615) 327-7130

January 18, 2004

JAN 22 2004

Cecil Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Crowson:

This letter concerns the proposed amendments to Supreme Court Rule 13.

By way of introduction, I am a neuropsychologist, currently employed by Vanderbilt Forensic Psychiatry. I am an assistant professor at Vanderbilt University School of Medicine, holding appointments in the Psychiatry, Neurology, and Psychology departments.

Since my move to Nashville in 1998, I have seen several defendants for evaluation and submitted charges under Rule 13. I am very concerned about the proposed changes. At the least, the proposed fee schedule cap will greatly limit my ability to serve as a consultant in most cases.

In my opinion, the changes will have the unwanted effect of discouraging many psychologists from providing consulations for the court. This will especially be true for psychologists, like myself, who are trained as neuropsychologists and/or who practice in a medical school setting.

Neuropsychologists are lumped, according to the proposed rule, along with all other psychologists. However, by nature of our unique discipline, neuropsychologists receive much more training and experience in brain disease and its assessment. The length and intensity of our training is very similar to that of a physician. For example, in my case, I completed an internship in neuropsychology in a medical school setting. I took the same clinical neurology classes as medical school students. I attended brain surgery rounds and observed surgery sessions. I am one of only two or three psychologists in the state of Tennessee certified by Medicare to bill for certain medical procedures involving direct brain manipulation under anesthesia. I have served as the director of neuropsychology at a brain injury hospital. After completing internship and becoming licensed, I then received an additional three years of supervision and training, more than two years of which were specifically in the area of forensic neuropsychology. In my opinion, the remuneration of neuropsychologists should be commensurate with that of physicians, since there is no difference in the length and intensity of our training.

The rule will also have an adverse impact on which neuropsychologists will be willing and able to undertake consulations for the court. Those of us who practice in a medical school setting are

accustomed to having our income taxed by our universities at a rate of 30% or more, in addition to our overhead expenses. In my case, more than 62% of my collections go to overhead and the university's taxes, making the proposed rate of $125 per hour simply unsustainable.

While many fine psychologists in private practice will no doubt continue to provide services at the reduced rate, the state should consider that the proposed changes will reduce or even remove any incentive for many experienced and well-trained psychologists to provide services for the state.

As you are well aware, the cases that are referred for psychological and neuropsychological evaluations often involve the severest penalties, and are often very complicated cases. In the last few years, I have seen cases involving serious brain diseases such as Huntington's chorea, cases of mania and psychosis, and cases involving suspected faking of many disorders. It is surely in the state's interest to assure that quality services are rendered, whether by physicians or psychologists.

I urge you to reconsider these proposed changes. Do not hesitate to contact me if I can provide any further information about my concerns.

Very truly yours,

James S. Walker, Ph.D.
Assistant Professor, Psychiatry and Neurology
Clinical Neuropsychologist

MIKE WHALEN
Lawyer
905 Locust Street
Knoxville, TN 37902

Member:
National Lawyers Guild
National Association of Criminal Defense Lawyers
Tennessee Association of Criminal Defense Lawyers
Knoxville Association of Criminal Defense Lawyers

Voice (865) 525-1393
FAX (865) 523-4623

January 20, 2004

Appellate Court Clerk Cecil Crowson
100 Supreme Court Building
401 Seventh Ave. North
Nashville, Tennessee 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee

Where to begin. The most disturbing thing about the proposed changes to Rule 13 is the part in 6(b)(1) and (2) that says the claims shall be reviewed and keeping in mind the revenues of the state . . . Are the rules not intended to help do justice within the justice system? While an hourly rate of $40 out of court and $50 in court for non-capital cases might seem "reasonable", once the caps are taken into consideration, there is no way that a private lawyer such as myself can afford to take many appointed cases if I intend to pay my bills, my secretary and my taxes.

I cannot believe that any member of this Court or the AOC would feel that $1000 would be sufficient to spend in the defense of one of your loved ones accused of child rape, aggravated assault, rape, burglary, etc., etc. To try any felony case requires so much more. For that matter the trial of a misdemeanor case would normally require more. While I recognize that all expenditures must be seen in the context of state budgets, it cannot be true that something as fundamental as the rights to a fair trial can be so squeezed by financial constraints as to make its provision a matter of form over substance.

It would appear that to try and get approval of an investigator in an attempted murder case would require the expenditure of more time than I could be paid for trying the case. I'm told that there are those within the AOC that believe that counsel don't need investigators in most cases because we can interview our own witnesses. That may be true but that $1000 cap is going to be gone before the first prospective juror sits down. And what happens when that witness changes her testimony? How is the cross examination done without halting the trial, appointing a new lawyer so that the first one can now testify about the prior inconsistent statement?

This is not merely a what if. Last April I tried an attempted second degree murder case in Knox County. The testimony of the mother of the alleged victim was crucial. I had the investigator interview her, I interviewed her. Her story was always the same. Then she takes the stand and changes her story in a significant way. She even denied having ever spoken with my

investigator. I had a tape of her conversation with my investigator which showed that she clearly understood that he worked for me and why he was there and I had a transcript of that tape in my hand as I cross examined her. This was at the time when there was great debate over whether it was unethical for a lawyer to have a witness statement taped by another. So I faced the dilemma of having my client face a long sentence if convicted against being disciplined for having protected his rights by following the regular practice of having the investigator tape the interview just like the police do when they talk to my clients. In the end I called the investigator to the stand to tell how he came to talk to this woman and what she said. My client was acquitted. Had I not had that investigator the cross would have been:

Ms. X didn't we talk about this case?
Yes.
And didn't you talk to my investigator Mr. Z?
No.
You didn't talk to investigator Z on January 12, 2001 at 5 p.m.?
No.
Didn't you tell me he said A.
No.
And in fact you told investigator Z, he said A too didn't you?
No.
Are you sure?

There's a winner!

My client might well be serving a sentence for a crime he did not commit! Now the state might have a few more dollars in the coffers but would justice be served? Of course not! We all know better and we know that our system is big enough to protect the citizens of this state whether they or rich or poor. The only question is will we? Will you?

I can sleep with a small bank account due to my representation of a lot of indigent folks. Can this Court and the people of this state rest well with more wrongful convictions and justice denied? I hope not. I urge you not to restrict the rights of our fellow citizens nor to cheapen our justice system to the point that it is justice in name only. If the current system is being abused then lets be judicial in addressing the abusers and not add to the abuse by diminishing constitutional rights.

Sincerely,

Mike Whalen

METROPOLITAN PUBLIC DEFENDER'S OFFICE
404 James Robertson Parkway
Parkway Towers, Suite 2022
Nashville, TN 37219

Ross Alderman
Public Defender

(615) 862-5730
(615) 862-5736 Fax

January 23, 2004

Janice Rawls, Chief Deputy Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

IN RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13

Dear Ms. Rawls:

I write, on the behalf of the 38 attorneys in the Davidson County Public Defender's Office, to respond to the Supreme Court's request for comments on the proposed amendments to Rule 13.

I have reviewed and support the joint comments and proposals filed by the Tennessee Bar Association, the Tennessee Association of Criminal Defense Lawyers, the Tennessee Public Defender's Conference and the Tennessee Post-Conviction Defender.

Sincerely,

Ross Alderman
Public Defender